

LEGISLATIVE COUNSEL
FILE COPY

August 15, 1967

AMENDMENT

Page 11, line 21, insert after the word "violation." the following: "The Attorney General shall defend all officers or persons sued under this section who acted pursuant to an order, regulation, or directive, or who, in his opinion, did not willfully violate the provisions of this Act."

August 15, 1967

AMENDMENT

Provided, however, That nothing contained in this Act shall be construed to prohibit an officer of the Central Intelligence Agency or of the National Security Agency from requesting any civilian employee or applicant to take a polygraph test, or to take a psychological test, or to provide a personal financial statement designed to elicit such information if the Director of the CIA or Director of NSA makes a personal finding with regard to each individual to be so tested or examined that such test or information is required to protect the national security.

AMENDMENTS

1. Amendment to Section 1 (a) page 2, line 13:

"Provided further, that nothing contained in this subsection shall be construed to prohibit inquiry concerning the national origin of any such employee when such inquiry is deemed necessary or advisable to determine suitability for assignment to activities or undertakings related to the national security within the United States or to activities or undertakings of any nature outside the United States."

2. Amendment to Section 1 (b), page 2, line 25: Add

"in respect" after the words "agency, or". (Technical amendment.)

3. Delete section 1 (e), page 4, lines 1-4 of (prohibitions on patronizing business establishments, and renumber following sections as sections 1(e), (f), (g), (h), (i), (j), (k), and (l), respectively.4. Delete Section 4, page 10, lines 13-23 (Criminal Penalties) and renumber following sections as sections 4, 5, 6, 7, and 8, respectively.5. Amendment to Section 1 (l), page 4, line 25:

"Provided further, however, that nothing contained in this section shall be construed to prohibit an officer of the department or agency from advising any civilian employee or applicant of a specific charge of sexual misconduct made against that person, and affording him an opportunity to refute the charge."

6. Amendments to Section 1 (f), page 4, at lines 17 and 19:

Change "psychiatrist" to "physician."

7. Amendment to Section 2 (b), page 9, at line 6 and line 9:

Change "psychiatrist" to "physician."

8. Amendment to Section 2 (b), page 9, at line 15:

"Provided further, however, that nothing contained in this section shall be construed to prohibit an officer of the Civil Service Commission from advising any civilian employee or applicant of a specific charge of sexual misconduct made against that person, and affording him an opportunity to refute the charge."

9. Amendment to Section 5(1), page 16, at line 24:

Strike "sign charges and specifications under section 830 (article 30)" and insert in lieu thereof: "convene general courts martial under Section 822 (Article 22)" (Technical Amendment)

10. Amendment to Section 6 (m), page 17, line 14:

Change subsection (j) to (k). (Technical amendment)

11. Amendment, page 18, line 6: Add New Section 7:

"Sec. 7. Nothing contained in Sections 4 and 5 shall be construed to prevent establishment of agency grievance procedures to enforce this Act, but the existence of such procedures shall not preclude any applicant or employee from pursuing the remedies established by this Act or any other remedies provided by law: Provided, however, that if under the procedures established, the employee or applicant has obtained complete protection against threatened violations or complete redress for violations, such action may be pleaded in bar in the Federal District Court or in proceedings before the Board on Employee Rights: Provided further, however, that if an employee elects to seek a remedy under either section 4 or section 5, he waives his right to proceed by an independent action under the remaining section."

SA-1.

SECTION-BY-SECTION ANALYSISSECTION 1

Section 1 (a) makes it unlawful for a Federal official of any department or agency to require or request, or to attempt to require or request, any civilian employee of the United States serving in the department or agency or any person seeking employment to disclose his race, religion, or national origin, or the race, religion, or national origin of any of his forebears.

This section does not prohibit inquiry concerning citizenship of such individual if his citizenship is a statutory condition of his obtaining or retaining his employment. Nor does it preclude inquiry of the individual concerning national origin when such inquiry is thought necessary or advisable in order to determine suitability for assignment to activities or undertakings related to national security within the United States or to activities or undertakings of any nature outside the United States.

This provision is directed at any practice which places the employee or applicant under compulsion to reveal such information as a condition of the employment relation. It is intended to implement the concept underlying the Federal merit system by which a person's race, religion, or national origin have no bearing on his right to be considered for Federal employment or on his right to retain a Federal position. This prohibition does not limit the existing authority of the Executive branch to acquire such information by means other than self-disclosure.

Section 1 (b)

Section 1 (b) makes it unlawful for any officer of any executive department or executive agency of the United States Government, or for any person acting or purporting to act under this authority, to state, intimate, or to attempt to state or intimate, to any civilian employee of the United States serving in the department or agency that any notice will be taken of his attendance or lack of attendance at any assemblage, discussion or lecture held or called by any officer of the executive branch of the United States Government, or by any person acting or purporting to act under his authority, or by any outside parties or organizations to advise, instruct, or indoctrinate any civilian employee of the United States serving in the department or agency in respect to any matter or subject other than the performance of official duties to which he is or may be assigned in the department or agency, or (2) in respect to the development of skills, knowledge, or abilities which qualify him for the performance of such duties.

SA-2.

Nothing contained in this section is to be construed to prohibit taking notice of the participation of a civilian employee in the activities of any professional group or association.

This provision is designed to protect any employee from compulsion to attend meetings, discussions and lectures on political, social, and economic subjects unrelated to his duties. It prevents government officials from using the employment relationship to attempt to influence employee thoughts, attitudes and actions on subjects which may be of concern to them as private citizens. In particular, this language is directed at practices and policies which in effect require attendance at such functions, including official lists of those attending or not attending; its purpose is to prohibit threats, direct or implied, written or oral, of official retaliation for non-attendance.

This section does not affect existing authority for providing information designed to promote the health and safety of employees. Nor does it affect existing authority to call meetings for the purpose of publicizing and giving notice of activities sponsored by the department or agency, or campaigns such as charitable fund campaigns and savings bond drives.

Section 1 (c)

Section 1 (c) makes it unlawful for any officer of any executive department or agency, or for any person acting or purporting to act under his authority, to require or request or to attempt to require or request any civilian employee serving in the department or agency to participate in any way in any activities or undertakings unless they are related to the performance of official duties to which he is or may be assigned in the department or agency or to the development of skills, knowledge or abilities which qualify him for the performance of such duties.

This section is directed against official practices, requests, or orders that an employee take part in any civic function, political program, or community endeavor, or other activity which he might enjoy as a private citizen, but which is unrelated to his employment.

Section 1 (d)

Section 1 (d) makes it unlawful for any officer of any executive department or agency, or for any person acting under his authority to require or request or attempt to require or request, any civilian employee serving in the department or agency to make any report of his activities or undertakings unless they are related to the performance of official duties or to the development of skills, knowledge, or abilities which qualify him for the performance of such duties, or (2) unless there is reason to believe that the

SA-3.

employee is engaged in outside activities or employment in conflict with his official duties.

This section is a minimum guarantee of the freedom of an employee to participate or not to participate in any endeavor or activity in his private life as a citizen, free of compulsion to report to supervisors his action or his inaction, his involvement or his non-involvement. This section is to assure that in his private thoughts, actions, and activities he is free of intimidation or inhibition as a result of the employment relation.

The exceptions to the prohibition are not legislative mandates to require such information in those circumstances, but merely provide an area of executive discretion for reasonable management purposes and to assure observance and enforcement of existing laws governing employee conduct and conflicts of interest.

Section 1 (e)

Section 1 (e) makes it unlawful for any officer of any executive department or agency, or any person acting under his authority, to require or request any civilian employee serving in the department or agency, or any person applying for employment as a civilian employee to submit to any interrogation or examination or to take any psychological test designed to elicit from him any information concerning his personal relationship with any person connected with him by blood or marriage, or concerning his religious beliefs or practices, or concerning his attitude or conduct with respect to sexual matters.

In accordance with an amendment made after hearings on S. 3779, a proviso is included to assure that nothing contained in this section shall be construed to prevent a physician from eliciting such information or authorizing such test in the diagnosis or treatment of any civilian employee or applicant where he feels the information is necessary to enable him to determine whether or not the individual is suffering from mental illness. The bill as introduced limited this inquiry to psychiatrists, but an amendment extended it to physicians, since the Subcommittee was told that when no psychiatrist is available, it may be necessary for a general physician to obtain this information in determining the presence of mental illness and the need for further treatment.

This medical determination is to be made in individual cases and not pursuant to general practice or regulation governing the examination of employees or applicants according to grade, agency, or duties.

SA-4.

Under an amendment to the bill, this language is not to be construed to prohibit an official from advising an employee or applicant of a specific charge of sexual misconduct made against that person and affording him an opportunity to refute the charge. While providing no authority to request or demand such information, the section does not prevent an official who has received charges of misconduct which might have a detrimental effect on the person's employment, from obtaining a clarification of the matter if the employee wishes to provide it.

This section would not prohibit all personality tests but merely those questions on the tests which inquire into the three areas in which citizens have a right to keep their thoughts to themselves.

It raises the criterion for requiring such personal information from the general "fitness for duty" test to the need for diagnosing or treating mental illness. The second proviso is designed to prohibit mass testing programs. The language of this section provides guidelines for the various personnel and medical specialists whose practices and determinations may invade employee personal privacy and thereby affect the individual's employment prospects or opportunities for advancement.

Section 1 (f)

Section 1 (f) makes it unlawful for any officer of any executive department or agency or any person acting under his authority, to require or request or attempt to require or request any civilian employee or any applicant for employment to take any polygraph test designed to elicit from him information concerning his personal relationship with any person connected with him by blood or marriage, or concerning his religious beliefs or practices or concerning his attitude or conduct with respect to sexual matters. While this section does not eliminate entirely the use of so-called lie detectors in government, it assures that where such devices are used, officials may not inquire into matters which are of a personal nature.

Section 1 (g)

Section 1 (g) makes it illegal for an official to require or request an employee under his management to support the nomination or election of anyone to public office through personal endeavor, financial contribution or any other thing of value. An employee may not be required or requested to attend any meeting held to promote or support the activities or undertakings of any political party in the United States.

SA-5.

The purpose of this section is to assure that the employee is free from any job-related pressures to conform his thoughts and attitudes and actions in political matters unrelated to his job to those of his supervisors. With respect to his superiors, it protects him in the privacy of his contribution or lack of contribution to the civic affairs and political life of his community, state and nation. In particular, it protects him from commands or requests of his employer to buy tickets to fund-raising functions, or to attend such functions, to compile position papers or research material for political purposes, or make any other contribution which constitutes a political act or which places him in the position of publicly expressing his support or non-support of a party or candidate. This section also assures that, although there is no evidence of such activities at present, no Federal agency may in the future improperly involve itself in the undertakings of any political party in the United States, its territories, or possessions.

Section 1 (h)

Section 1 (h) makes it illegal for an official to coerce or attempt to coerce any civilian employee in the department or agency to invest his earnings in bonds or other government obligations or securities, or to make donations to any institution or cause. This section does not prohibit officials from calling meetings or taking any other appropriate action to afford employees the opportunity voluntarily to invest his earnings in bonds or other obligations or voluntarily to make donations to any institution or cause. Appropriate action, in the committee's view, might include publicity and other forms of persuasion short of job-related pressures, threats, intimidation, reprisals of various types, and "blacklists" circulated through the employee's office or agency to publicize his non-compliance.

Section 1 (i)

Section 1 (i) makes it illegal for an official to require or request any civilian employee in the department or agency to disclose any items of his property, income, or other assets, source of income, or liabilities, or his personal or domestic expenditures or those of any member of his family. Exempted from coverage under this provision is any civilian employee who has authority to make any final determination with respect to the tax or other liability to the United States of any person, corporation, or other legal entity, or with respect to claims which require expenditure of Federal moneys.

Neither the Department of the Treasury nor any other executive department or agency is prohibited under this section from requiring any civilian employee to make such reports as may be necessary or appropriate for the determination of

SA-6.

his liability for taxes, tariffs, custom duties, or other obligations imposed by law. This proviso is to assure that Federal employees may be subject to any reporting or disclosure requirements demanded by any law applicable to all persons in certain circumstances.

Section 1 (j)

Section 1 (j) makes it illegal to require or request any civilian employee exempted from application of section 1 (i) under the first proviso of that section, to disclose any items of his property, income, or other assets, source of income, or liabilities, or his personal or domestic expenditure or those of any member of his family or household other than specific items tending to indicate a conflict of interest in respect to the performance of any of the official duties to which he is or may be assigned.

This section is designed to abolish and prohibit broad general inquiries which employees have likened to "fishing expeditions" and to confine any disclosure requirements imposed on an employee to reasonable inquiries about job-related financial interests. This does not preclude, therefore, questioning in individual cases where there is reason to believe the employee has a conflict of interest with his official duties.

Section 1 (k)

Section 1 (k) makes it unlawful for a Federal official of any department or agency to require or request, or attempt to require or request, a civilian employee who is under investigation for misconduct, to submit to interrogation which could lead to disciplinary action without the presence of counsel or other person of his choice, if he wishes.

This section is intended to rectify a long-standing denial of due process by which agency investigators and other officials prohibit or discourage presence of counsel or a friend. This provision is directed at any interrogation which could lead to loss of job, pay, security clearance or denial of promotion rights.

This right inures to the employee at the inception of the investigation, and the section does not require that the employee be accused formally of any wrongdoing before he may request presence of counsel or friend. The section does not require the agency or department to furnish counsel.

Section 1 (l)

Section 1 (l) makes it unlawful for a Federal official of any department or agency to discharge, discipline, demote, deny promotion, relocate, reassign, or otherwise impair existing terms or conditions of employment of any employee, or threaten to commit any such acts, because the employee has refused or failed to comply with any action made unlawful by this Act or exercised any right granted by the Act.

(SA-7.)

This section prohibits discrimination against any employee because he refuses to comply with an illegal order as defined by this Act or takes advantage of a legal right embodied in the Act.

SECTION 2

Section 2 (a) makes it unlawful for any officer of the United States Civil Service Commission or any person acting or purporting to act under his authority to require or request, or attempt to require or request, any executive department or any executive agency of the United States Government, or any officer or employee serving in such department or agency, to violate any of the provisions of Section 1 of this act.

Specifically, this section is intended to ensure that the Civil Service Commission, acting as the coordinating policy-making body in the area of Federal civilian employment shall be subject to the same strictures as the individual departments or agencies.

Section 2 (b) makes it unlawful for any officer of the United States Civil Service Commission, or any person acting or purporting to act under his authority, to require or request, or attempt to require or request, any person seeking to establish civil service status or eligibility for civilian employment, or any person applying for employment, or any civilian employee of the United States serving in any department or agency, to submit to any interrogation or examination or to take any psychological test which is designed to elicit from him information concerning his personal relationship with any person connected with him by blood or marriage, or concerning his religious beliefs or practices, or concerning his attitude or conduct with respect to sexual matters.

This section is intended to assure that the Civil Service Commission shall be subject to the same prohibitions to which departments and agencies are subject in Sections 1 (e) and (f). The provisos contained in section 1(e) are restated here to assure that nothing in this section is to be construed to prohibit a physician from acquiring such data to determine mental illness, or an official from informing an individual of a specific charge of sexual misconduct and affording him an opportunity to refute the charge.

Section 2 (c) makes it unlawful for any officer of the United States Civil Service Commission to require or request any person seeking to establish civil service status or eligibility for employment, or any person applying for employment in the executive branch of the United States Government, or any civilian employee serving in any department or agency to take any polygraph test designed to elicit from him information concerning his personal relationship with any person connected with him by blood or marriage, or concerning his religious beliefs or practices, or concerning his attitude or conduct with respect to sexual matters.

SA-8.

This section applies the provisions of section 1 (f) to the Civil Service Commission in instances where it has authority over agency personnel practices or in cases in which its officials request information from the applicant or employee.

SECTION 3.

This section applies the Act to military supervisors by making violations of the act also violations of the Uniform Code of Military Justice.

SECTION 4

Section 4 provides civil remedies for violation of the Act by granting an applicant or employee the right to bring a civil action in the Federal District Court for a court order to halt the violation, or to obtain complete redress against the consequences of the violation. The action may be brought in his own behalf or in behalf of himself and others similarly situated, and the action may be filed against the offending officer or person in the Federal District Court for the district in which the violation occurs or is threatened, or in the district in which the offending officer or person is found, or in District Court for the District of Columbia.

The court hearing the case shall have jurisdiction to adjudicate the civil action without regard to the actuality or amount of pecuniary injury done or threatened. Moreover, the suit may be maintained without regard to whether or not the aggrieved party has exhausted available administrative remedies. If the individual complainant has pursued his relief through administrative remedies established for enforcement of the Act and has obtained complete protection against threatened violations or complete redress for violations, this relief may be pleaded in bar of the suit. The court is empowered to provide whatever broad equitable and legal relief it may deem necessary to afford full protection to the aggrieved party; such relief may include restraining orders, interlocutory injunctions, permanent injunctions, mandatory injunctions, or such other judgments or decrees as may be necessary under the circumstances.

Another provision of Section 4 would permit an aggrieved person to give written consent to any employee organization to bring a civil action on his behalf, or to intervene in such action. "Employee organizations" as used in this section includes any brotherhood, council, federation, organization, union, or professional association made up in whole or in part of Federal civilian employees, and which deals with departments, agencies, commissions, and independent agencies regarding employee matters.

SA-9.

SECTION 5

Section 5 establishes an independent Board on Employees' Rights, to provide employees with an alternative means of obtaining administrative relief from violations of the Act, short of recourse to the judicial system.

Section 5 (a) provides for a Board composed of three members, appointed by the President with the consent of the Senate. No member shall be an employee of the United States Government and no more than two members may be of the same political party. The President shall designate one member as Chairman.

Section 5 (b) defines the term of office for members of the Board, providing that one member of the initial Board shall serve for five years, one for three years, and one for one year from the date of enactment; any member appointed to fill a vacancy in one of these terms shall be appointed for the remainder of the term. Thereafter, each member shall be appointed for five years.

Section 5 (c) establishes the compensation for Board members at \$75.00 for each day spent working in the work of the Board, plus actual travel expenses and per diem in lieu of subsistence expenses when away from their usual places of residence.

Section 5 (d) provides that two members of the Board shall constitute a quorum for the transaction of business.

Section 5 (e) provides that the Board may appoint and fix the compensation of necessary employees, and make such expenditures necessary to carry out the functions of the Board.

Section 5 (f) authorizes the Board to make necessary rules and regulations to carry out its functions.

Section 5 (g) provides that the Board shall have the authority and duty to receive and investigate written complaints from or on behalf of any person claiming to be affected or aggrieved by any violation or threatened violation of this Act, and to conduct a hearing on each such complaint. Moreover, within ten days after the receipt of such a complaint, the Board must furnish notice of time, place, and nature of the hearing to all interested parties, and within thirty days after concluding the hearing, it must render its final decision regarding any complaint.

Section 5 (h) provides that officers or representatives of any employee organization in any degree concerned with employment of the category in which the violation or threat occurs, shall be given an opportunity to participate in the hearing through submission of written data, views, or arguments. In the discretion of the Board they are to be afforded an opportunity for oral presentation. This section applies to all Federal Government employees unless

SA-10.

upon by any party or by any Federal employee organization to participate in any phase of any administrative or judicial proceeding under this section shall be free to do so without incurring travel cost or loss in leave or pay. They shall be free from restraint, coercion, interference, intimidation, or reprisal in, or because of, their participation. Any periods of time spent by government employees during such proceedings shall be held to be Federal employment for all purposes.

Section 5 (i) applies to the Board hearings the provisions of the Administrative Procedure Act relating to notice and conduct of hearings insofar as consistent with the purpose of this section.

Section 5 (j) requires the Board, if it determines after a hearing that this Act has not been violated, to state such determination and notify all interested parties of the findings. This determination shall constitute a final decision of the Board for purposes of judicial review.

Section 5 (k) specifies the action to be taken by the Board if, after a hearing, it determines that any violation of this act has been committed or threatened. In such case, the Board shall immediately issue and cause to be served on the offending officer or employee an order requiring him to cease and desist from the unlawful practice or act. The Board is to endeavor to eliminate the unlawful act or practice by informal methods of conference, conciliation, and persuasion.

Within its discretion, the Board may, in the case of a first offense, issue an official reprimand against the offending officer or employee, or order the employee suspended from his position without pay for a period not exceeding fifteen days. In the case of a second or subsequent offense, the Board may order the offending officer or employee suspended without pay for a period not exceeding thirty days, or may order his removal from office.

Officers appointed by the President, by and with the advice and consent of the Senate, are specifically excluded from the application of these disciplinary measures; but the section provides that, in the case of a violation of this Act by such individuals, the Board may transmit a report concerning such violation to the President and the Congress.

Section 5 (l) provides for Board action when any officer of the armed forces of the United States or any person acting under his authority violates the Act. In such event, the Board shall (1) submit a report to the President, the Congress, and to the Secretary of the military department concerned, (2) endeavor to eliminate any unlawful act or practice through informal methods of conference, conciliation and persuasion, and (3) refer its determination and

SA-11.

the record in the case to any person authorized to convene general courts-martial under section 822 (Article 22) of Title 10, United States Code. When this determination and report is received, the person designated shall immediately dispose of the matter under the provisions of chapter 47 of title 10 of the United States Code.

Section 5 (m) provides that when any party disagrees with an order or final determination of the Board, he may institute a civil action for judicial review in the Federal District Court for the District wherein the violation or threatened violation occurred, or in the District Court for the District of Columbia.

The Court has jurisdiction to (1) affirm, modify, or set aside any determination or order made by the Board, or (2) require the Board to make any determination or order which it is authorized to make under section 5 (k) but which it has refused to make. In considering the record as a whole, the court is to set aside any finding, conclusion, determination, or order of the Board unsupported by substantial evidence.

The type of review envisioned here is similar to that obtained under the Administrative Procedure Act, in such cases but this section affords a somewhat enlarged scope for consideration of his case than is now generally accorded on appeal of employee cases. The court here has more discretion for action on its own initiative. To the extent that they are consistent with this section, the provisions for judicial review in Title 5 of the United States Code would apply.

Section 5 (n) provides for congressional review by directing the Board to submit to the Senate and to the House of Representatives an annual report which must include a statement concerning the nature of all complaints filed with it, the determinations and orders resulting from hearings, and the names of all officers or employees against whom any penalties have been imposed under this section.

Section 5 (o) provides an appropriation of \$100,000 for the Board on Employee Rights.

SECTION 6

Section 6 is a Subcommittee amendment. It provides that nothing contained in sections 5 or 6 shall be construed to prevent the establishment of agency grievance procedures to enforce this Act. The section makes it clear, however, that the existence of such procedures are not to preclude any applicant or employee from pursuing any other available remedies. However, if under the procedures established by an agency, the complainant has obtained complete

SA-12.

protection against threatened violations, or complete redress for violations, such relief may be pleaded in bar in the Federal District Court or in proceedings before the Board on Employee Rights.

Furthermore, an employee may not seek his remedy through both the Board and the Court. If he elects to pursue his remedies through the Board under section 5, for instance, he waives his right under section 4 to take his case directly to the District Court.

SECTION 7

Section 7 provides that the Federal Bureau of Investigation shall be excluded from the provisions of this Act.

SECTION 8

Section 8 is a statement of the standard severability clause. In the event that any provision in this Act is held invalid, the remaining parts of the Act are not to be affected by its invalidity.